No. 3831.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Wm. H. Moore, Jr., as Trustee in Bankruptcy of the Estate of Kimball & Webb, a Partnership Composed of H. J. Kimball, Jr., and Rex Webb, and H. J. Kimball, Jr., and Rex Webb as Individuals, Bankrupt,

Appellant,

vs.

T. E. Risley,

Appellees.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

This controversy comes before this court on an appeal from an order of the United States District Court for the Southern District of California, affirming an order theretofore made by Clyde H. Thompson, Esq., the referee in bankruptcy of said court, to whom the matter of the bankruptcy involved here was referred,

the order of said referee holding that the lease in question here had been terminated and is not an asset of said bankrupt estate, and that the petitioner in said proceedings (appellant here) has no right to sell, assign, or dispose of the same, and that the respondent (appellee here) is entitled to the possession of the leased premises, and dismissing the petition of appellant filed for the purpose of determining whether or not said lease constituted an asset of said estate.

The lessees in the lease in question are Rex Webb, H. J. Kimball, Jr. (who are the bankrupts in the proceeding in which this controversy arises), and one J. H. Koll [Transcript, page 7], and T. E. Risley, appellee herein, is the lessor. By said lease it is provided that "this lease and all the rights of said lessees hereunder shall, at the option of the lessor, cease and terminate upon said lessees being by any court adjudged bankrupt or insolvent." [Transcript, page 8.]

Appellant contends:

First: That under facts of the case there was no violation of the condition of the lease providing for a termination of the same upon the lessees being adjudicated bankrupt; and,

Second: That if there was a breach of the condition and forfeiture, the same was waived.

Specification of Errors.

Appellant contends that the lower court erred:

First: In affirming the order of Clyde H. Thompson, Esquire, referee in bankruptcy herein, dated

November 8th, 1921, holding that the lease between T. E. Risley as lessor, and Rex Webb, J. H. Koll and H. J. Kimball, Jr., as lessees, was terminated and at an end, and that the same is not an asset of the above named bankrupt estate and that said trustee has no right whatsoever in said lessee or any right to sell, assign or dispose of the same, and that said T. E. Risley is entitled to the possession of the property covered by said lease.

Second: That said court erred in holding that there was a violation of the covenants in said lease providing that all rights of the lessees thereunder should at the option of the lessor cease and terminate upon said "lessees being by any Court adjudged bankrupt," one of said lessees, to-wit: J. H. Koll, not having been adjudged bankrupt.

Third: Said court erred in holding that the acceptance of rent by said T. E. Risley under the circumstances of the case was not a waiver of any breach of the covenants providing for forfeiture of said lease by said Risley.

Fourth: Said court erred in not disaffirming the order of said referee and in not holding that said lease was and is in full force and effect and the property of Wm. H. Moore, Jr., as trustee in bankruptcy of the estate of the above named bankrupt.

POINTS AND AUTHORITIES ON FIRST CONTENTION.

It is a stipulated fact that but two of the lessees have been adjudged bankrupt; that the third lessee has not been so adjudged, and appellant contends that the condition of the lease is not violated unless all of the lessees have been so adjudged bankrupt.

This being a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. (Section 1442, Civil Code of California.)

> "That the condition in a lease calling for a forfeiture is to be strictly construed against the lessor is a universal rule recognized by all the authorities. It has been declared that a provision for the forfeiture of a lease will always be construed so as to prevent rather than aid the forfeiture."
>
> Jones on Landlord and Tenant, Sec. 468.
>
> "The courts have always held a very strict hand over these conditions for defeating leases. Very easy modes have always been countenanced for putting an end to them. The lessor, if he pleased, might certainly have provided against the change of occupancy as well as against an assignment, but he has not done so by words which admit of no other meaning."
>
> Crusoe v. Bugby, 3 Wils. 234, 2 W. Bl. 766.

> "Covenants of this description are construed by courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation."
>
> Taylor on Landlord and Tenant, Sec. 403.

In Hasbrook v. Paddock, 1 Barb. 635, it was held that a lease of a lot which provided for a forfeiture, if the lot should be used for purposes other than the manufacture of salt, was not forfeited by the use of a part of the lot for other purposes.

In the case of Jackson v. Silvernail, 15 Johns, 278, the subletting of a part of leased premises for less than the full term was held not to violate lessee's covenant in the original lease "to not sell and dispose of, or assign their estate in the demised premises," the court holding that the assignment meant the whole estate and not a mere subletting, the court saying that "the plaintiff's right is *stricti juris,* and to enable him to recover on the ground of forfeiture, he must bring his case within the penalty on the most literal and rigid interpretation of the covenants"

In the case of Lynde v. Hough, 27 Barb. 415, it was held that a covenant "not to let or underlet the whole or any part" of the demised premises did not preclude an assignment of the whole interest.

The three foregoing cases were cited in the case of Randol v. Scott, 110 Cal. 590, to show the extremes to which the courts go in holding to the rule "that forfeitures of estates and restraints upon alienations should not be enforced except when the terms of the conditions are so plain as to be beyond the province of construction," in which case it was held that an adjudication and an assignment in insolvency by one of two lessees, to which the other lessee was not a

party, was not a breach of a covenant by two joint lessees "to not assign this lease or permit any assignment thereof to be made by bankruptcy or otherwise, with out the written consent of the lessor."

On page 595 of the opinion the court, in considering the lease, uses the following language:

> "Appellant must be considered as having dealt with the lessees as tenants in common, and with the knowledge of their rights, powers, and disabilities as such tenants. When, therefore, under these circumstances it was covenanted merely that the 'lessees' should not assign 'the lease,' as an entirety, the meaning of the parties is presumed to be that the lease should not be assigned in the only way in which it could be assigned, namely, by the joint act of the lessees. The lease, therefore, was not assigned within the meaning of the contract. * * * * The covenant does not provide that the lease should be forfeited upon the assignment by one of the tenants in common of his interest. The understanding of the parties as to the covenants in question is illustrated by another clause which provides that the lessor may cancel the lease "in case of the death of the lessees'—not of one of the lessees. A forfeiture can be enforced only when there is "such a breach shown as it was the clear and manifest intention of the parties to provide for."

It has often been held that where a lease is made by several lessors jointly and provides that upon the failure of the lessees to perform any of the covenants, it shall be null and void, if the *lessors* shall so elect,—

that a forfeiture of the leasehold interest for breach of conditions can be declared only by the joint and concurrent action of all of the lessors.

The case of Jameson, *et al,* v. Chanslor-Canfield Midway Oil Company, *et al,* 176 California, page 1, is such a case. Certain provisions of the lease, it was claimed, had not been complied with. Two of the lessors served upon the defendant in the action, which was the lessee, notice of forfeiture and demand for possession of the premises. The two plaintiffs owned a three-fourths interest in the land, and their co-lessor owned a one-fourth interest. The judgment of the court below quieted the title to the three-fourths interest in the land. The court, in considering the effect of the notice, and after citing section 1442 of the Civil Code of the State of California, and holding that the provisions of the lease in relation to forfeiture must be strictly interpreted against the lessors, uses the following language, on page six of the opinion:

> "The event which caused the forfeiture is the failure of the lessees to perform any of the conditions embodied in the lease for a period of thirty days after a notification. By the language of the paragraph, this notification must be given 'by the parties of the first part.' It is only upon the giving of this notice and the failure to perform the conditions mentioned therein that the forfeiture can be declared. This is a condition which must happen in order to give a right to declare the forfeiture. The condition cannot be said to

> have happened upon notification given by some of the parties of the first part, or any number of them less than all. After the notification has been given by all of the parties, a forfeiture may be brought about only 'after said first parties shall so elect.' Here again the action of all of said first parties is necessary to the happening of the condition. It is argued that the only purpose of notification was to give information to the lessee, and that this could be given as well by notice from one of the parties as from all. But the contract measures the rights of the parties in this respect, and, being a contract regarding a forfeiture and to be strictly construed, its requirements must be fully met before the right depending thereon can be complete."

The above case is the reverse of the instant case, but the principle of construction announced there is in point here, and we submit that the contract in question here measures the rights of the landlord to declare a forfeiture, and that forfeiture can only be declared if the "lessees," not one of them or two of them or any number of them less than all, be adjudged bankrupt.

At the time of bankruptcy it is true that all the interest of the third lessee had been assigned to the bankrupt, and that they were the owners of the entire term, but the fact remains that so far as this ownership is concerned, two-thirds of the interest was held by them by reason of their being lessees in the lease, and the other one-third by reason of their being the assignees of the third lessee, and in the provision of this lease

the word "lessees" has reference not to persons upon whom the term might eventually devolve, but to parties to whom the lease was originally made. The language is "said lessees," that is, the parties to whom the lease is made, not any one to whom the term might thereafter be transferred. The appellee could have easily added language providing for such a contingency at the time the lease was drawn, but did not do so, and we submit that under the law applicable to this case, the court should not at this time write into his lease for the purpose of working a forfeiture, something that is not there, when the clear meaning of the language used, without the aid of construction, prevents a forfeiture. Construction and addition is necessary to work a forfeiture, and we submit the court should not aid in any way.

The case of Doe v. Smith, 1 E. C. L., 406, uses the following language on page 408:

> "This is an ejectment founded on a supposed forfeiture of a lease by the lessee having assigned. Rogers was the lessee for twenty-one years; he covenants that he, his executor, or administrator, would not demise, let, set over, or depart with that indenture of lease, or the premises. There is a clause for re-entry on breach of any covenants. Rogers becomes a bankrupt; his assignees take to the lease, and assign it to Palmer, who assigns to Rogers * * * * * There is a subsequent assignment by Rogers. If he had actually assigned it while he remained lessee, no doubt it would have been a breach, and forfeiture,

> but the covenant does not extend to assigns. Rogers stood in the condition of assignee; that interest which he signed over must be considered as the interest which he purchased as assignee, not what he originally had. This, therefore, ought not to be considered as an assignment by the lessee."

The court stated that but for a statute which relieved a lessee assigning his lease from all its obligations he would have held that a forfeiture was created by Rogers' assignment, in view of the fact that he was named in the lease as "lessee," but there is no question of the fact that the transfer by any other "assignee of the lease" would not have been held a transfer by the "lessee" within the meaning of the condition.

In the case of Crawford v. Bugg, 8 Ont. 8, E. leased to P. P., without E.'s consent, assigned to J. B. The lease provided, "and the said lessee for himself, his executors, administrators and assigns, hereby covenants with the said lessor, his heirs and executors, administrators and assigns, in name and form following, that is to say." Then followed the covenant, "not to assign or sublet without leave." Held that the covenant did not include the assignees, as they could not be held to be named; and that the prefatory words of the covenant would have no contrary effect.

> "The cause of action is founded upon a parol contract to pay the rent reserved in a lease from the plaintiff to Edward A. Tudor for a term of three years, from the first day of January, 1859,

at a yearly rent, payable monthly on the first day of each month thereafter. It is stated that the lease was in writing and signed by them, and that it was not to be assigned without the consent of the lessor in writing. This averment does not by its terms extend beyond the immediate parties to the lease, and it cannot by any fair legal intendment be held to include assignees."

Dougherty v. Mathews, 35 Mo. 520.

"If the agreement can be reasonably interpreted so as to avoid the forfeiture, it is our duty to do so."

Quatman v. McCray, 128 Cal. 285, 289.

"A contract is not to be construed to provide a forfeiture unless no other interpretation is reasonably possible."

New Liverpool Salt Co. v. Western Salt Co., 151 Cal. 479, 485.

It will be seen from the foregoing that in the construction of a lease where a forfeiture is involved, that if any possible construction can be made which will prevent a forfeiture, that the courts adopt such construction, and we submit that in the lease in question a forfeiture can only be decreed by going beyond the express provision of the lease. The lease provides that if the "lessees"—not one of them, nor two of them, but all of them—shall be adjudged bankrupt, and the lease makes no provision whatever for a forfeiture in the event the holders of the entire term (other than the lessees named) should be adjudged bankrupt, and

we submit that the court erred in holding that under the circumstances of this case there was a forfeiture of the lease.

Counsel for appellee will undoubtedly contend that by virtue of the acceptance of the assignment of Koll's interest in the lease, which reads—"And in consideration of the foregoing assignment to us, we hereby agree to be bound by and comply with all of the terms and conditions of said lease" [Transcript, page 9]—that the conditions of the lease were in some way changed so that the adjudication of Kimball and Webb meets the condition and works a forfeiture. Such acceptance only binds them to "all the terms and conditions of said lease." One of those conditions is that the "lease," at option of lessor, shall "cease and terminate upon said lessees being by any court adjudged bankrupt." The acceptance does not purport to change in any way such condition, and Kimball and Webb simply assert that they are bound by it, and that in the event "said lessees"—not one of them, or two of them, but *all* of them—be so adjudged bankrupt, the lease may be terminated; consequently, we fail to see how the contention can in any way be pertinent.

The attention of the court is called to the fact that Koll is not released from the obligations of the lease by the assignment of his interest. His liability continues. He is still one of the lessees named in the lease and referred to in the condition, which appellee claims creates a forfeiture. We do not think for a minute that if Koll had been adjudicated bankrupt

and Kimball and Webb were not, that it would ever have occurred to appellee to claim a forfeiture, yet we submit that if the lease can be forfeited on the adjudication in bankruptcy of a less number than all of the lessees, the condition is broken by the adjudication of any one of them. It certainly was not the intention of the parties that any such event should create a forfeiture, and a forfeiture cannot be created in the instant case without changing "said lessees" to read "any of said lessees," a construction opposed to all the authorities.

Points and Authorities on Second Contention.

Appellant contends, however, that even if there was a forfeiture, the same was waived by the lessor. The correspondence in relation to the lease between the Receiver in Bankruptcy, now trustee and appellant herein, and said landlord, the appellee, is set forth on pages 10 to 13 of the transcript. Following those communications, the receiver, Mr. Moore, caused to be handed to Mr. Risley, the appellee, a check for $350.00, on the back of which was the following endorsement, "September, 1921, rental of store at #1141 J. street, Fresno, under lease dated Oct. 4, 1919, $350.00." The lease and store referred to being the lease and premises in question here.

On receipt of this check, Mr. Risley took same to the referee in bankruptcy and told him that he intended to exercise his option under the lease to cancel it, Kimball & Webb having been adjudged bankrupt, and

asked the referee if he would forfeit his right so to do if he accepted the check, considering the endorsement. The referee stated to Mr. Risley that he did not think the receiver intended to take any advantage of him in that particular. Thereafter, Mr. Risley obliterated the words and figures, "lease dated Oct. 4, 1919, $350.00," and endorsed and cashed the check. This transaction was prior to the adjudication in bankruptcy.

On October 1st, 1921, and after the adjudication in bankruptcy, Mr. Moore, having in the meantime been elected trustee in bankruptcy, caused another check for the rent of said premises, signed by himself as trustee, to be delivered to Mr. Risley, on the back of which was the following endorsement, "Oct. rental under lease $350.00." On receipt of this check Mr. Risley obliterated the words and figures, "under lease $350.00," and thereupon cashed said check. This was after the delivery to said trustee of a notice of termination of lease, in which Mr. Risley called attention of the trustee to the fact that said Kimball & Webb had been adjudged bankrupt on August 15th, and that by virtue of the provisions of said lease he exercised his option to terminate the same. [Transcript, page 14.]

There is no question, assuming that the condition had been violated, which we deny, but that Mr. Risley was fully advised of the adjudication of Kimball & Webb.

The unquestioned rule in regard to waiver is stated by the Supreme Court of the state of California, in the

case of McGlynn, *et al.*, v. Moore, *et al.*, 25 Cal., 384, 394, as follows:

> "There can be no doubt that the receipt of rent accruing subsequent to the act which works forfeiture, waived the forfeiture."

Appellant will undoubtedly contend that the question of forfeiture is one of intent, and that the action of Mr. Risley throughout indicates that he had no intention of waiving such forfeiture. Appellant contends that if he did not intend to waive the forfeiture, he should not have accepted the rent as it was tendered; that it was his duty to either accept or reject on the basis on which it was tendered, and having accepted, he accepted as it was tendered, regardless of his protestations.

> "The courts not favoring forfeiture are usually inclined to take hold of any circumstances which indicate an election to waive a forfeiture."
>
> "Queen Ins. Co. v. Young, 86 Ala. 424 (quoted by the District Court of Appeals, Second District, Division Two, California, in the case of Jones v. Della Maria, 191 Pac. 943)."

The case of Gulf C. & S. Ry. Co. v. Settegast, 79 Tex. 256, was one in which rent had been paid after a forfeiture and accepted, the lessor protesting all the time that he did not waive any right of forfeiture in so doing, and the court uses the following language:

> "It is well settled that an act of forfeiture is waived by receiving rent which afterwards accrues, provided the landlords have notice of the

act of forfeiture at the time of payment. It will not do for appellees to say that they declined to receive the payment for fear that they would thereby waive their rights against their lessors, and that they were told by the party making the tender that their right would not be waived. It is a case in which actions are more effective than words."

A very instructive case under much stronger facts than are involved in the present case, is that of Croft v. Lumley, 5 El. & Bl. 678, 119 Eng. Rep. (full reprint), 622, 634, where the court uses the following language:

"Certainly Mr. Martelli, always, most resolutely, insisted, both by his letter and by word of mouth, that he would receive the money offered, as compensation for the occupation only, and not as rent under an existing lease, and that he would reserve the lessor's right of re-entry, and, at the moment when he at last took up the money, he repeated the expression that he took it as compensation, not as rent, reserving the right of re-entry. But there is an established maxim of law that, when the money is paid, it is to be applied according to the expressed will of the payer, not of the receiver. If the party to whom the money is offered does not agree to apply it according to the expressed will of the party offering it, he must refuse it, and stand upon the rights which the law gives him. We see no reason why this maxim should not be applied to the transaction in question."

The above case was affirmed in 6 H. L. C. 672, on another proposition. Eight of the nine judges to whom the two propositions involved were referred, held that there was a waiver under the facts of the case.

It is respectfully submitted that the order of the District Court affirming the order of the referee dismissing appellant's petition, should be overruled, and that it should be ordered that the lease in question is not forfeited but remains an asset of said estate and should be sold by the trustee thereof, as such.

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